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No. 14-114

In the Supreme Court of the United States

DAVID KING, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).....30, 32

Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837 (1984).....3, 25 & n.18

Citizens United v. FEC, 558 U.S. 310 (2010).....14-15

City of New York v. Clinton, 524 U.S. 417 (1998).....4 n.7

Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1328 (11th Cir. 2011).....8, 35-36

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U. S. 477 (2010).....36-37

INS v. Chadha, 462 U. S. 919 (1983).....4 n.7

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).....38

David King, et al., v. Sylvia Burwell, Sec'y of Health and Hum. Servs., et al., 759 F.3d 358 (4th Cir. Va. 2014, No. 14-1158), *pet. for cert. granted*, 135 S. Ct. 475 (Nov. 7, 2014).....1 n.1 and *passim*

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).....1 and *passim*

Rochin v. California, 342 U.S. 165 (1952).....32

Shelby County v. Holder, 133 S. Ct. 2612 (2013).....3, 25, 26

United States v. Windsor, 133 S. Ct. 2675 (2013).....10

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 759 F.3d 388 (5th Cir. 2014, No. 13-50411), *cert. granted*, 190 L. Ed. 2d 474 (Dec. 5, 2014) (14-144).....16-17 & n. 12

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).....24

CONSTITUTION

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STATUTES

Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).....1 n.4, and *passim*

§ 1304(d), codified at 42 U.S.C. § 18024(d).....5

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26 U.S.C. § 36B(c)(2)(A)(i).....4 n.6, 10

RULE

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OTHER AUTHORITIES

(All Internet links last visited January 28, 2015.)

Br. of Amicus Curiae David Boyle in Supp. of Non-Gov't Parties (Jan. 28, 2014) in *Hobby Lobby*, *supra*.....30

Briefs in *King v. Burwell*, *supra*:

Br. for Pet'rs (Dec. 22, 2014).....6, 7, 27, 28

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Br. of Mo. Liberty Project and Mo. Forward Found. as *Amici Curiae* in Supp. of Pet'rs (Dec. 29, 2014).....26-27

Alan Cooperman, *Sedative Withdrawal Made Rehnquist Delusional in '81*, Wash. Post, Jan. 5, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010400140_pf.html.....15-16 & n.11

Brianna Ehley, *The Fiscal Times*, Jan. 21, 2015, *Americans Rank Health Care as Top Financial Burden*, http://www.thefiscaltimes.com/2015/01/21/Americans-Rank-Health-Care-Top-Financial-Burden.....11-12 & n.8

Manny Fernandez, *With Stickers, a Petition and Even a Middle Name, Secession Fever Hits Texas*, N.Y. Times, Nov. 23, 2012, *available at* http://www.nytimes.com/2012/11/24/us/politics/with-stickers-a-petition-and-even-a-middle-name-secession-fever-hits-texas.html?_r=0.....17-18 & n.13

Stephen D Foster Jr, *Supreme Court Justice Scalia Says He Doesn't Feel Bad About People Losing*

Their Health Insurance, Addicting Info, Nov. 16, 2014, 11:00 a.m., http://www.addictinginfo.org/2014/11/16/supreme-court-justice-scalia-says-he-doesnt-feel-bad-about-people-losing-their-health-insurance/.....13-14 & n.10

Sahil Kapur, *Why This Conservative Lawyer Thinks He Can Still Cripple Obamacare*, Talking Points Memo, Sept. 26, 2014, 6:00 a.m., http://talkingpointsmemo.com/dc/michael-carvin-halbig-supreme-court.....28-29 & n.19

President Abraham Lincoln, 2d Inaugural Address (Mar. 4, 1865).....38 & n.20

Luke 6:31.....16

Luke 10:29-37.....38

Matthew 7:12.....16

Chris Megerian, *Obamacare brings expanded coverage and higher costs to California*, L.A. Times, May 13, 2014, 11:25 a.m., *available at* http://www.latimes.com/local/political/la-me-pc-california-obamacare-healthcare-expansion-20140513-story.html.....21-22 & n.17

Mot. for Recons. of Mot. of David Boyle to Intervene, in Supp. of Ct.-Appointed Amicus Curiae on the Issue of Severability, in *NFIB v. Sebelius* (11-393) & *Florida v. HHS* (11-400) (May 7, 2012), *mot. denied*, 132 S. Ct. 2763 (June 11, 2012).....1 n.3, 30

Mot. for Recons. of Mot. of David Boyle to Intervene as Resp't or Otherwise, and to Add Questions Presented, in *HHS v. Florida* (11-398) (May 7, 2012), *mot. denied*, 132 S. Ct. 2763 (June 11, 2012).....1 n.3, 30

Off. of Governor Edmund G. Brown, Jr., *Governor Brown Delivers 2013 State of the State Address* (Jan. 24, 2013), *available at* http://gov.ca.gov/news.php?id=17906.....21 & n.16

S. Poverty L. Ctr., *Active Neo-Confederate Groups*, http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-confederate/active_hate_groups.....18 & n.14

Staff Reports, *Ku Klux Klan fliers found in 2 East Texas towns*, Longview News-J., updated 12:22 p.m., Oct. 2, 2013, http://www.news-journal.com/blogs/talk_of_east_texas/ku-klux-klan-flyers-found-in-east-texas-towns/article_e2811d14-2ae7-11e3-8d97-001a4bcf887a.html.....18 & n.15

J.R.R. Tolkien, *The Fellowship of the Ring* (1954), bk. II, chp. 1, "Many Meetings".....14

Debra Cassens Weiss, *Scalia compares himself to Frodo in originalism battle*, ABA J., Oct. 2, 2014, updated 3:25 a.m., http://www.abajournal.com/news/article/scalia_compares_himself_to_frodo_in_originalism_battle.....12-13 & n.9

AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 14-114 ("*King*").[2] He filed the final motions[3] in *NFIB v. Sebelius* (132 S. Ct. 2566 (2012)), which, while not granted *per se*, did get largely what they asked for, including upholding the Patient Protection and Affordable Care Act[4] ("the Act"), and ending at least some of the most odious justifications for the "individual mandate"[5] ("Mandate") to buy unwanted health insurance. Now he is back for another round, to see if people in need can get the Act-based subsidies they need to better avoid sickness and death.

Not all the issues here are simple, of course. The Petitioners raise some *prima facie* respectable questions about statutory interpretation, federalism, democratic input and accountability, etc. However,

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court.

[2] *David King, et al., v. Sylvia Burwell, Sec'y of Health and Hum. Servs., et al.*, 759 F.3d 358 (4th Cir. Va. 2014, No. 14-1158), *pet. for cert. granted*, 135 S. Ct. 475 (Nov. 7, 2014).

[3] Mot. for Recons. of Mot. of David Boyle to Intervene, in Supp. of Ct.-Appointed Amicus Curiae on the Issue of Severability, in *NFIB v. Sebelius* (11-393) & *Florida v. HHS* (11-400) (May 7, 2012), and Mot. for Recons. of Mot. of David Boyle to Intervene as Resp't or Otherwise, and to Add Questions Presented, in *HHS v. Florida* (11-398) (May 7, 2012); *mots. denied*, 132 S. Ct. 2763 (June 11, 2012).

[4] Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).

[5] Act § 1501(b) (26 U.S.C. § 5000A).

even if Respondents are not entirely correct, there is still ample ground to allow at least some of the contested subsidies to continue, for those who want the subsidies, so that the Act can do its job and the number of ill or dead Americans can be lowered.

SUMMARY OF ARGUMENT

The Act should have been much better written, but despite the Act's flaws, contextual evidence offers strong support for Respondents' assertions about Section 1401 (26 U.S.C. § 36B). After all, Section 1401, *see id.*, does not *explicitly* exclude federal Exchanges from offering subsidies.

Upholding the subsidies may be much easier to explain, to either experts or the public, than upholding the unprecedented Mandate that pressures Americans to buy unwanted health insurance for decades. If the Court upheld the Mandate, surely they can uphold the subsidies.

On a similar note, if the Court can show compassion for the health or dignity of convicted criminals and prisoners, or of same-sex couples denied federal recognition of a State marriage, then *a fortiori*, the Court should show compassion for millions of people who would be denied subsidies and risk illness and death.

The States, too, have dignity, but it is not truly infringed by subsidies on federal Exchanges, in the way that the threat to strip States of all Medicaid funding for refusal to join the Act's Medicaid expansion did infringe States' dignity.

There are worthy incentives for States to establish Exchanges, even if federally-established Exchanges also offer subsidies.

Just because the Act may have other problems besides the subsidies issue, those problems should not vicariously decide the subsidies issue.

There is little separation-of-powers problem with federal-Exchange subsidies, and there is no need to send the issue back to Congress, in light of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Jonathan Gruber's remarks may not really support Petitioners' position; and nonpartisanship is important in this case, as in others.

In case the Court doubts the perfection of Respondents' position, there is a middle ground available, that would preserve the subsidies yet allow those who don't want them to avoid them. That is, individuals in the 34 States with federal Exchanges could be allowed to opt out of subsidies (and any ensuing Mandate). Also, employers in those States might be allowed to opt out of liability for not providing employees health insurance.

Finally, if the subsidies are struck down, they are severable from the rest of the Act, which should survive, and which Act in turn should help the Union's citizens survive and thrive.

ARGUMENT

I. 26 U.S.C. § 36B IS NOT AS TRANSPARENT AS PETITIONERS CLAIM, AND IS EASILY READABLE, IN CONTEXT, AS SUPPORTING SUBSIDIES FROM FEDERAL EXCHANGES

A. 26 U.S.C. § 36B(b)(2)(A) Does Not Say, "Qualified Health Plans . . . . Enrolled In through an Exchange Established by the State

under Section 1311, But Not Through a Federal Exchange Established under Section 1321"

26 U.S.C. § 36B(b)(2)(A) ("36B(b)(2)(A)") does say, re "premium assistance credit amount", that it may reflect, with respect to a coverage month, "[t]he monthly premiums for such month for 1 or more qualified health plans which were enrolled in through an Exchange established by the State under [Section] 1311 of the . . Act", *id.* This obviously allows a State Exchange to offer a subsidy. But, quite simply, 36B(b)(2)(A), *see id.*, does not explicitly bar another Exchange, such as a federal one established under Section 1321 (42 U.S.C. § 18401), from offering one.[6]

Clearly, from Respondents' perspective, 36B(b)(2)(A) should ideally have said, " which were enrolled in through an Exchange established by the State under [Sections] 1311 or 1321 of the Act". That would have been much clearer than the present version,[7] which does not mention Section 1321. At the same time, there are not the exclusive and limiting words, "but not through a Federal Exchange established under Section 1321". If those latter words were in 36B(b)(2)(A), then Respondents would not have much of a case. But those words are not there.

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[6] Similarly, 26 U.S.C. § 36B(c)(2)(A)(i) offers no explicit bar on federal-Exchange subsidies.

[7] The Act might have been "exhaustively considered", but was hardly "finely wrought", *City of New York v. Clinton*, 524 U.S. 417, 439-40 (1998) (quoting *INS v. Chadha*, 462 U. S. 919, 951 (1983)), unfortunately.

One can always bring in "*expressio unius est exclusio alterius*", but we are dealing with the context of the whole Act, not just one isolated provision.

Otherwise put, 36B(b)(2)(A) allows subsidies *if* there is a State-established exchange, but does not explicitly say that subsidies are allowed *only if* there is a State-established exchange. (Sometimes diagramming of logic uses arrows, so that "If A then B" would be shown as "A → B", given that A is sufficient to produce B as a necessary consequence; but if A is *necessary*, not *sufficient*, the arrow would not point away from the A, but point at it, "[whatever element] → A" "If" means "sufficient", but "only if" means "necessary".) A State-established exchange is sufficient to allow subsidies, but not necessary, given the multiple reasons that Respondents cite.

B. In 36B(b)(2)(A), "State" Does Not Even Really Mean "State", Thus Showing the Need for Contextual Interpretation

Moreover, if anyone claims that 36B(b)(2)(A) is somehow transparent and unequivocal, operating free of any context: the word "State" there does not even necessarily mean a State. What the real meaning of "State" there is, is seen in 42 U.S.C. § 18024(d) (Act § 1304(d)): "'State' means each of the 50 States and the District of Columbia." *Id.* Q.E.D., 36B(b)(2)(A) sorely needs contextual help, of the kind that Respondents provide.

C. Petitioners' Treatment of "Qualified Individual" Follows the Same Logic That They Condemn in Respondents

And it is worth pointing out that, re what Petitioners say,

> *Second*, the Act never actually limits enrollment on Exchanges to "qualified individuals," so even if no qualified individuals existed for HHS Exchanges, that would not preclude enrollment. This is an "obvious flaw" in the Government's claim. *Halbig*, 758 F.3d at 404. Entitled "Consumer Choice," § 1312 of the ACA says only that a qualified individual "may enroll in any qualified health plan available to such individual and for which such individual is eligible."42 U.S.C. § 18032(a)(1). It does not say others are barred. In other words, this is a *floor guaranteeing* that qualified individuals *may* enroll, not a *ceiling precluding* all others.

Br. for Pet'rs (Dec. 22, 2014) at 49: a close look at the paragraph above shows that Petitioners are using the same method of reasoning that they condemn in Respondents. Respondents say that, as Amicus noted *supra* at 3-5, when a State itself establishes an Exchange, that is essentially "a *floor guaranteeing* that qualified individuals *may* [receive subsidies from a State Exchange], not a *ceiling precluding* all others[, such as those wanting subsidies from federal

Exchanges]", to borrow from Br. for Pet'rs at 49. And "the Act never actually limits enrollment on Exchanges to 'qualified individuals,' [and] § 1312 of the ACA does not say others are barred", *id.*, sounds remarkably like what Amicus said *supra* at 3-5 about the lack of an explicit bar on federal subsidies in the 34 States with federal exchanges.

Since sauce for the goose may serve for the gander as well, it seems that Respondents have a strong argument for the treatment of 36B(b)(2)(A) as allowing subsidies on federal Exchanges.

II. ALLOWING THE SUBSIDIES MAY BE EASIER TO JUSTIFY THAN ALLOWING AN UNPRECDENTED MANDATE TAX/PENALTY ON PEOPLE WHO REFUSE BUYING HEALTH INSURANCE

But Amicus respects Petitioners. In fact, he enjoyed the work of Petitioners' counsel-of-record back in 2012 in the Court's health care cases. Like him, Amicus opposes the Mandate. Indeed, Amicus more strongly opposed the Mandate than any other litigant in the Nation, arguably, in that Amicus has always held that neither the Federal Government nor any State (e.g., Massachusetts) should be allowed to wield a Mandate against its people.

Amicus remembers that many people were stupefied when the Court upheld the Mandate tax (also called a "penalty") on Americans who did not feel like buying health insurance. Such a "tax" was unprecedented. The *NFIB* dissent noted unhappily that more time should have been spent on the issues involved, *see* 132 S. Ct. at 2655, and that the decision placed the Federal Government in an overly-

powerful position *vis-à-vis* American citizens, *see id.* at, e.g., 2676.

Amicus agrees that the Mandate should have been struck down (as the Eleventh Circuit did, *see Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Hum. Servs.*, 648 F.3d 1235, 1328 (11th Cir. 2011), the appeals-court iteration of *NFIB*), although he would have saved the rest of the Act, as the Eleventh Circuit did, *see* 648 F.3d 1235, 1328.

But in any case, many people thought the unprecedented Mandate tax hard to justify. By contrast, there is plenty of precedent for using context to fill in gaps or ambiguous areas in statutes, so that 36B(b)(2)(A)'s *prima facie* deficit of justification for federal subsidies, can be filled in from other sources in the Act.

Various people, including Amicus, are interested in trying to overturn the Mandate at some future point (as there may well be legal grounds to do). The Mandate may be considered a thieving and tyrannical measure which lets corporations dictate that Americans buy their products—or else. But the Court has limited "moral capital", as does anyone else on Earth; if the Court overturns the subsidies, that may make it harder to overturn the Mandate—which really deserves overturning—in the future. (If the Court seems to be overturning parts of the Act every five minutes, so to speak, the public may tire of that.)

Additionally, many of the public might see the overturning of the Mandate as an end to oppression, while, by contrast, they may see the ending of Exchange subsidies in 34 States as an oppression in itself, especially if they still have to obey the

Mandate, but do it without help of the subsidy. People may not like seeing a source of money for healthcare dry up suddenly.

Or, otherwise put, to "punish" insurance corporations, by ending forced health-insurance purchase, the public may not mind. But to see themselves, the People, "punished", by taking away their subsidies, they may not appreciate.

In conclusion: if the Court does not uphold the subsidies now, when it did something much more unusual in 2012 by upholding the Mandate, observers may well wonder how fair and consistent the Court is being.

III. THE COURT SHOULD SHOW COMPASSION IN A COHERENT MANNER IN VARIOUS CASES, INCLUDING THE PRESENT ONE, IF IT SHOWS COMPASSION AT ALL

And that issue of consistency also deals with the Court's showing compassion in various cases to different groups of people. If it unjustifiably shows compassion to some, but not to others, the credibility of the Court may suffer.

Naturally "compassion" may not mean much here, if the Court decides that 36B(b)(2)(A) means exactly what the Petitioners say: in that event, there might be rather little to discuss. But if there is a "gray area" in and around 36B(b)(2)(A), then there is room to consider compassion in allowing the subsidies.

A. Examples of the Court Showing Compassion in Instances That May Be No More Urgent than Federal-Exchange Subsidies

The Court has shown compassion, for example, even to criminals in need of healthcare. *See Brown v. Plata*, 131 S. Ct. 1910 (2011), upholding a district court decision releasing roughly 40,000 Californian prisoners from prison due to violation of their Eighth Amendment rights, and mentioning "[n]eedless suffering and death", *Brown v. Plata*, *supra*, at 1923; "the essence of human dignity inherent in all persons", *id.* at 1928; and that "depriv[ation] of adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society". *Id.* (Kennedy, J.)

Indeed. But if a bunch of lawbreakers can receive compassion from the Court about health care, *see id.*, then why can't millions of innocent, non-criminal people who benefit from healthcare subsidies also receive compassion, instead of having their subsidies destroyed because of some putative vagueness in 36B(b)(2)(A) (or 36B(c)(2)(A)(i))?

And *vis-à-vis* those who desire same-sex marriage, the Court has shown much compassion, *see United States v. Windsor*, 133 S. Ct. 2675 (2013), overturning statutory language which "prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive" and "raises the cost of health care for families" *Id.* at 2694, 2695 (Kennedy, J.) (citation omitted). Well, if "government healthcare benefits" and "the cost of health care for families", *id.*, are so important for a small subset of Americans, those who want to enter a gay or same-sex marriage, then might those health issues be even proportionally more important for the much larger number of Americans eligible for federal-Exchange subsidies?

Indeed, on a common-sense level, it might be far more important to have health care, at all, than to be able to force a sovereign (State or federal) to give you an officially-recognized same-sex marriage against the sovereign's will (even if deprivation of such, may sometimes deprive you of some degree of health care). Dead people enter no marriages, and lack of health care produces dead Americans. So, the subsidies should be saved if possible.

(The logic may not work the other way around, however; just because federal-Exchange subsidies are granted, that does not mean the Court is obliged to grant marriage to same-sex couples, polygamous units, or siblings, especially since sodomy, polygamy, and incest may all statistically *harm* health at times, instead of assisting health as the subsidies do.)

—Amicus also mentions same-sex marriage since he has heard scuttlebutt that the Court may consider some "Grand Bargain", whereby "liberals" get something this June, mandatory gay marriage nationwide, and "conservatives" get something too, the end of the subsidies (or the destruction of the whole Act?). Amicus does not believe the Court would stoop to such a "bargain"; but warns against it nevertheless.

For the importance of subsidies to Americans, *see, e.g.*, Brianna Ehley, *The Fiscal Times*, Jan. 21, 2015, *Americans Rank Health Care as Top Financial Burden*,[8]

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[8] http://www.thefiscaltimes.com/2015/01/21/Americans-Rank-Health-Care-Top-Financial-Burden.

> [T]he burden of rising health care costs. . . could get even worse in the coming months for millions of Americans who rely on federal subsidies to afford their insurance policies if the Supreme Court rules against the administration in the case of King v. Burwell.
>
> If that happens, 4.8 million Americans who purchased health coverage through the federal exchange will lose their subsidies—potentially forcing them out of their insurance policies.

Id.

B. Justice Antonin Scalia's Comparison of Himself to Frodo Baggins, and His Stated Lack of Concern for Those Who Lose Health Insurance

By the way, some Justices have shown some concern for their image re public affairs. *See, e.g.*, Debra Cassens Weiss, *Scalia compares himself to Frodo in originalism battle*, ABA J., Oct. 2, 2014, updated 3:25 a.m.,[9]

> Justice Antonin Scalia made two public appearances on Wednesday, calling for balance in interpreting the church-state divide in one, and comparing his support for originalism

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[9] http://www.abajournal.com/news/article/scalia_compares_himself_to_frodo_in_originalism_battle.

> to the quest of the *Lord of the Rings* character Frodo Baggins in the other.
>
> . . .
>
> "It's a long, uphill fight to get back to original orthodoxy," Scalia said. "We have two originalists on the Supreme Court. That's something. But I feel like Frodo" from J. R. R. Tolkien's *Lord of the Rings* series, he said. "We'll get clobbered in the end, but it's worth it."
>
> As Business Insider and Above the Law have noted, this is not the first time Scalia has likened himself to the hobbit who traveled to Mount Doom to destroy the One Ring. [A]t an American Enterprise Institute event in 2012, he explained his comparison by saying, "The evil eye will get us sooner or later, but it's worth the fight."

Id. In another forum, however, Scalia showed little feeling about Americans' health-insurance loss, *see, e.g.*, Stephen D Foster Jr, *Supreme Court Justice Scalia Says He Doesn't Feel Bad About People Losing Their Health Insurance*, Addicting Info, Nov. 16, 2014, 11:00 a.m.,[10]

> At issue was a clause in the agreement that said retired employees "will receive a full company

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[10] http://www.addictinginfo.org/2014/11/16/supreme-court-justice-scalia-says-he-doesnt-feel-bad-about-people-losing-their-health-insurance/.

> contribution towards the cost of [health] benefits."
>
> SCALIA: You know, the nice thing about a contract case of this sort is you can't feel bad about it. I mean, this thing [the duration of the health benefits] is obviously an important feature. So I hope we'll get it right, but, you know, I can't feel bad about it.

Id. (citation omitted) Not only is this lack of concern arguably problematic in itself; it does not match Scalia's identification of himself with the Ring-bearer, heir to his Uncle Bilbo's terrible treasure. In fact, Frodo, with his march towards doom (literally), was a prime candidate for need of health care—which we see in his medical treatment by Lord Elrond at Rivendell after Frodo is wounded by the accursed Morgul-blade of the Witch-king of Angmar himself, the Lord of the Nazgûl. Thus, Frodo gets some highly excellent *free health care* from the master of Rivendell, *see* J.R.R. Tolkien, *The Fellowship of the Ring* (1954), bk. II, chp. 1, "Many Meetings"

The point here is not merely literary: while the Court should never write its opinions just to be popular, sometimes public opinion actually reflects the reality of how courts should rule. If the Court seems unsympathetic to the Americans who employ them, this may not redound to the glory of the Court.

C. Chief Justice Rehnquist's Placidyl Addiction and His Need for Health Care

—There was a recent "unexpected visit" to the Court, by some persons who dislike the *Citizens United v. FEC* (558 U.S. 310 (2010)) decision. There was a little to-do; indecorousness blossomed. Amicus is all for peaceful protest, but maybe it should not occur in midst of a Court session.

That being said, there is a grain of truth to protests about the Court, in that they remind us the People like to hold their Court accountable.

On that note: what would make any appearance of compassionless, or callous behavior by the Justices look especially questionable is the fact that one of their own badly needed help at one point: their Brother Justice, William Rehnquist. Before he was Chief Justice, Rehnquist suffered from addiction to the sleep drug Placidyl for ten years, *see, e.g.*, Alan Cooperman, *Sedative Withdrawal Made Rehnquist Delusional in '81*, Wash. Post, Jan. 5, 2007.[11] Fortunately, he was able to get medical help, though his withdrawal was harrowing:

> One doctor said Rehnquist thought he heard voices outside his hospital room plotting against him and had "bizarre ideas and outrageous thoughts," including imagining "a CIA plot against him" and "seeming to see the design patterns on the hospital curtains change configuration."
>
> At one point, a doctor told the investigators, Rehnquist went "to the

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[11] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/01/04/AR2007010400140_pf.html.

> lobby in his pajamas in order to try to escape."

Id. Rehnquist must have been going through a kind of living hell, but Amicus is pleased that he was able to access quality healthcare and surface from the darkness of drug addiction. However, many Americans have not been able to access an equal level of healthcare to that of Rehnquist, or maybe any healthcare at all beyond the minimal. The subsidies of the Act are an attempt, albeit flawed, to improve the average American's healthcare, since not only Supreme Court Justices need healthcare. As the Nazarene said, "Do onto others as you would have them do unto you." (*Matthew* 7:12, *Luke* 6:31)

Speaking of reciprocity and respect: Amicus knows that not only individuals, but States, should be treated with respect. Amicus has in other commentary to the Court noted that States, and their people, have a right to decide about marriage issues. But does the same principle apply to subsidy issues (as in the instant case)? i.e., do States have a right to nullify federal-Exchange subsidies? Or can one distinguish between the two instances, i.e., between marriage issues and subsidy issues?

IV. THE DIGNITY OF THE 34 STATES IS NOT REALLY COMPROMISED BY RESPONDENTS' POSITION

A. *Walker* and States' Right to Dignity

States have dignity which deserves to be upheld. A current Court case, *Walker v. Texas Division, Sons*

of Confederate Veterans, Inc.,[12] helps illustrate this. In *Walker*, *see id.*, the issue is whether Texas may ban a Confederate-flag symbol on state-issued license plates. The ban serves a valuable social purpose, naturally, since the State printing a potential symbol of hate and racism on license plates could be a State-endorsed expressive harm against African Americans, many of whom are reeling from events like those in Ferguson, Missouri, and the death of black New Yorker Eric Garner from a police chokehold. A State may be no more obliged to put a Confederate flag on a license plate than it is obliged to put a naked lady (or gentleman), a swear-word, a burning cross, or messages like "DEATH TO TEXAS [or DEATH TO AMERICA]", on a license plate, on some supposed "free speech" rationale. (Can't people print out those images themselves and put them on their bumper stickers, rather than sticking the State with the stigma of saying such stuff?)

However, the Confederate flag in particular is not just a possible vector of bigotry (despite any good intentions of the Sons of Confederate Veterans): it also challenges the dignity and sovereignty of the State itself. That is, it is a flag of a defeated foreign power, if the Confederacy is considered as such. For a Texas state license plate to fly the flag of an "anti-Texas", an opposite entity to the Union and its currently loyal States, is something like a collision of matter and anti-matter: explosive, and undermining the solidity of the State. In fact, with various secessionist movements going on in Texas, *see, e.g.*, Manny Fernandez, *With Stickers, a Petition and*

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[12] 759 F.3d 388 (5th Cir. 2014, No. 13-50411), *cert. granted*, 190 L. Ed. 2d 474 (Dec. 5, 2014) (14-144).

Even a Middle Name, Secession Fever Hits Texas, N.Y. Times, Nov. 23, 2012,[13] and various neo-Confederate or related movements there too, *see, e.g.*, S. Poverty L. Ctr., *Active Neo-Confederate Groups*[14] (undated but copyrighted 2015) (listing Southern National Congress and League of the South as current Texas neo-Confederate groups), and Staff Reports, *Ku Klux Klan fliers found in 2 East Texas towns*, Longview News-J., updated 12:22 p.m., Oct. 2, 2013,[15] a plethora of Confederate-flag-bearing license plates popping up in the Lone Star State, would arguably undermine Texas state dignity and authority in a serious way.

However, Amicus does not see upholding the federal-Exchange subsidies as undermining States' authority or dignity in that way.

B. The *NFIB* Medicaid-Expansion Issue versus the Present Subsidies Issue

States' dignity is one reason why it was legitimate for the Court to let States opt out of the Act's Medicaid expansion:

> Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those

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[13] *Available at* http://www.nytimes.com/2012/11/24/us/politics/with-stickers-a-petition-and-even-a-middle-name-secession-fever-hits-texas.html?_r=0.

[14] http://www.splcenter.org/get-informed/intelligence-files/ideology/neo-confederate/active_hate_groups.

[15] http://www.news-journal.com/blogs/talk_of_east_texas/ku-klux-klan-flyers-found-in-east-texas-towns/article_e2811d14-2ae7-11e3-8d97-001a4bcf887a.html.

> States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up[.]
>
> Given the nature of the threat and the programs at issue here, we must agree.

NFIB at 2603 (Roberts, C.J.). To "slap the States in the face", and also arguably disturb reliance interests, by taking away funds the States *already* had, was too much, *see id.*

However, the situation at bar is different. If a State does not set up its own Exchange, it is arguably *rewarded* in a sense, not punished, since the federal Government will do the job instead. Amicus is not aware of any penalty, either, for a State that refuses to set up an Exchange; contrast the *NFIB* situation *supra* (States losing the massive amount of *existing* Medicaid funds). (There may be an indirect "penalty" of sorts from a federal Exchange, e.g., the State's residents may receive unwanted subsidies (and have to obey the Mandate), and employers may have to offer healthcare to more residents. But that all is hardly on the scale of losing all existing Medicaid funds.)

V. THERE ARE INCENTIVES FOR A STATE TO OPEN AN EXCHANGE EVEN IF A FEDERAL EXCHANGE MAY GRANT SUBSIDIES

Admittedly, if federal subsidies flowed to a State-established Exchange but not a federally-established Exchange, that would be one initiative for a State to

establish an Exchange. But even if subsidies went to both Exchanges, there would still be reason for a State to establish an Exchange. Thus, the assertion that it makes no sense to let federal Exchanges give subsidies because that exterminates all incentive for States to start Exchanges, is incorrect.

One reason for a State to build an Exchange is that politicians or their parties can take political credit for doing so. If Joe Politician from State X can say, "With my inspirational leadership, we set up this wonderful health Exchange ourselves, we don't need any carpetbagging Feds invading our fair State and bothering us here with their 'federal Exchange'", etc., he gets the benefit of having substantial federal funds for his State's people, through the Exchange, and saying that he got the funds, instead of depending on some "Washington bureaucrat" to set up a federal Exchange.

In speaking of the coercive effect of withdrawing all Medicaid funds from States avoiding the Act's Medicaid expansion, *NFIB* said, "Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer." *Id.* at 2602-03 (Roberts, C.J.). Well, then, a "state official[ ] can fairly be held politically [popular] for choosing to accept the federal offer [to subsidize consumers on a State-established Exchange]", drawing on the language of *id.*

See, e.g., Off. of Governor Edmund G. Brown, Jr., *Governor Brown Delivers 2013 State of the State Address* (Jan. 24, 2013),[16]

> California was the first in the nation to pass laws to implement President Obama's historic Affordable Care Act. Our health benefit exchange, called Covered California, will begin next year providing insurance to nearly one million Californians. Over the rest of this decade, California will steadily reduce the number of the uninsured.
>
> Today I am calling for a special session to deal with those issues that must be decided quickly if California is to get the Affordable Care Act started by next January.

Id. (The California Exchange, *see id.*, was established *after* the IRS allowed federal-Exchange subsidies.). And *cf., e.g.*, Chris Megerian, *Obamacare brings expanded coverage and higher costs to California*, L.A. Times, May 13, 2014, 11:25 a.m.,[17]

> Enrollment in California's healthcare program for the poor has soared as the state implements President Obama's federal overhaul, pleasing advocates who have sought

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[16] *Available at* http://gov.ca.gov/news.php?id=17906.

[17] *Available at* http://www.latimes.com/local/political/la-me-pc-california-obamacare-healthcare-expansion-20140513-story.html.

> expanded coverage but also presenting new costs for the state.
>
> While unveiling his newest budget proposal[, Governor Jerry] Brown said expanded healthcare coverage represented "a huge social commitment on the part of the taxpayers of California."
>
> "I'm proud we did it," he said. "But we also have to take into account this thing is growing."

Id. (The latter article, *see id.*, is about Medi-Cal, not a State Exchange; but the point is that a State healthcare expansion in line with the Act, whether re an Exchange or Medicaid, can be a point of pride for a State politician, *see* Megerian Article, *supra*, not just an abject surrender to "Beltway dictators" from Washington, D.C. And pride is an incentive.)

There may also be the incentive of greater control over the Exchange by the State. If the Exchange were federally established and run from Washington, the State might have less input, either formally or informally, into how the Exchange is run. If there's going to be an Exchange in any case, either State- or federally-established, the State might want to have maximum influence over it. A State-established Exchange could be run by people known to leaders in the State, rather than being run by people in the Nation's capital.

VI. THIS CASE IS NOT A FREE-FLOATING OPPORTUNITY TO PUNISH THE EXECUTIVE BRANCH FOR ITS "SINS" *VIS-À-VIS* THE ACT

In regards to another issue: the Court should largely cabin its considerations to the matters in this case itself, rather than taking a general dissatisfaction with the Act (and the interesting things the Obama Administration has done with the Act) and using that as an extraneous reason for ending the federal-Exchange subsidies.

Amicus mentions this since multiple briefs on Petitioners' side emphasize various alleged misdeeds by the Administration, relating to the Act, and use those as reasons for the Court to rule for Petitioners. For example, the Cato Institute and Professor Josh Blackman brief (Dec. 29, 2014), *see id. passim*, mentions multifarious things the Administration did after the passing of the Act, things which the authors dislike. However, the brief also mentions multiple lawsuits already being filed against the alleged abuses, *see id.* at, e.g., 11 n.8.

Those particular lawsuits, then, can deal with the alleged abuses. There is no need for the Court to be duplicative and "teach the Administration a lesson" by overturning the subsidies (unless there is already a very excellent reason for overturning them), since others, filers of lawsuits, may be trying to teach the Administration a lesson already. (Amicus is neither condemning nor endorsing those plaintiffs' efforts; he is just noting that those efforts may not really abut upon the subsidies issue, even if they are about the Act in general.)

VII. SEPARATION-OF-POWERS AND "LEGISLATIVE FIX" ISSUES

Another problem some have asserted, is that the Administration and the IRS have endangered separation of powers by facilitating federal-Exchange subsidies. Amicus is not sure about this. A real separation-of-powers issue would be if, e.g., Congress tries to usurp the Executive's power of formal recognition of foreign powers, and dictate a certain formal recognition or non-recognition event. (Congress can decline to fund an embassy in Cuba, but that doesn't mean they can tell the President whether to recognize Cuba or not. In turn, the President cannot order Congress to fund the embassy.)

However, even though the federal-Exchange subsidies will involve billions of dollars, that alone does not mean that Congress is being disrespected, especially since the Congress that passed the Act seemed comfortable with creating that gigantic expansion of health care, the Act. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952): "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635-36 (Jackson, J., concurring in the judgment and opinion).

One wonders, seeing that Congress' apparent intent was that subsidies be widely available—since Congress seemingly thought many States would open Exchanges which would receive subsidies—: even if fewer States than expected chose to open Exchanges, still, Congress' intent to spread subsidies

widely would be fulfilled by what the IRS has done to support federal-Exchange subsidies. So there may not be much of a separation-of-powers problem. If the present Congress disagrees, they can use their power to try to change the Act, and the President can use his power, separate from Congress' power, to either support or veto their attempts.

Not that Congress needs to "fix" everything. If that were so, "*Chevron* deference"[18] would not exist, because Congress would have to fix everything, instead of letting agencies use their own expertise.

There may have been more of a case for a "legislative fix" in, say, *Shelby County*, *supra* at 3. In that case, voting-rights-law elements had gone unchanged for decades, and, as the Chief Justice noted, "[t]hings have changed in the South. . . . Nearly 50 years later, things have changed dramatically." *Id.* at 2621, 2625 (brackets in original). (*But cf. supra* at 16-18, on continuing problems with racism.) So it was plausible for the Court to overturn part of a statute in *Shelby County*, and let Congress fix things.

By contrast, the Act has only been around for a few years, not decades. And the States that do not want Exchanges, have perhaps not shown as much concern as they could have, for their residents' health. (If they turned down Exchanges because they thought that the employer mandate might hurt the business climate: business climate is a separate issue from health care.) Thus, one can argue that those States have not changed in the positive way

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[18] *See Chevron*, *supra* at 3 (recommending deference to agency expertise).

that the States in *Shelby County* have changed. So, the Act deals with that problem. If, however, decades from now, the States have changed and show more interest in their residents' health, then a "legislative fix" for problems in the Act may be more appropriate. For now, the federal-Exchange subsidies should be allowed to survive.

(Amicus is *not* saying, at all, that States refusing to open a health Exchange, is as bad as the racism which *Shelby County* asserts has abated in Southern states, *see id.* at 2621, 2625. It is interesting, though, that the Act may proportionately help minorities more than it helps others, in that there is sometimes an overlap between minority communities and low-income communities. Without being consciously mean-spirited, much less "consciously racist", then, States that do not support health Exchanges may end up not supporting healthcare improvement for minorities and low-income people, as much as those States could do.)

See also, e.g., the Missouri Liberty Project et al. brief (Dec. 29, 2014),

> Recent reports indicate that [Maine] Governor LePage's opposition [to a State-initiated Exchange] was additionally motivated by the desire to deprive Maine's citizens of the tax subsidies in order to force Congress to revisit the ACA. .
>
> In sum, the state political processes in over thirty States—including the

> State of Missouri—reflect the conscious decision to reject state-based exchanges. These decisions were made with knowledge—and, in some cases, the *intention*—that the failure to establish a state exchange could deprive the State's citizens of tax subsidies.

Id. at 17, 20 (citation omitted). While Amicus respects States' dignity, the idea that some States deliberately deprived residents of subsidies, and in the case of Maine apparently did so *as a political tool against the Act*, *see* MLP Br. *supra*, makes Amicus wonder if those States' leaders were making the optimal judgments for serving the health and welfare of their people.

On a common-sense basis, it is safe to say that people often like receiving money, including for important items like health care. It is one of the biggest weaknesses of Petitioners' position, and their amici's positions, that they little take into account the suffering that may occur if those who want the subsidies, and who may be relying on the subsidies, are prevented from receiving them just because some others in their States do not want them.

VIII. SOME REMARKS OF JONATHAN GRUBER AND PETITIONERS' COUNSEL; AND THE NEED FOR NONPARTISANSHIP

Petitioners' brief, to shore up its position, quotes a certain Jonathan Gruber as saying only the State Exchanges were meant to give subsidies, *id.* at 4-5 (citation omitted). Such a remark, along with some of Gruber's more offensive remarks elsewhere, may be

mistaken, either in fact or in tone. However, the snippet Petitioners quote, dated January 18, 2012, *see id.*, offers an interesting "chronology" issue, in that, as Petitioners note, the expansion of subsidies to federal Exchanges was only proposed in 2011, *before* Gruber's speech, *see* Pet'rs' Br. at 5 (citation omitted), but not implemented until *after* his speech, i.e., in May 2012, *see* Pet'rs' Br. at 5 (citations omitted). Thus, Gruber may have been narrowly correct when he spoke, in that before May 2012, it may not have been technically possible to let federally-established Exchanges offer subsidies. But even if his observation was true at the time, that does not *ipso facto* divest the IRS of discretion to implement the subsidies for federal Exchanges, in May 2012, if Congress delegated them the power to do so—and Respondents have argued well for that idea, the delegation of power by Congress.

But Gruber may not be the only maker of controversial remarks. *See* Sahil Kapur, *Why This Conservative Lawyer Thinks He Can Still Cripple Obamacare*, Talking Points Memo, Sept. 26, 2014, 6:00 a.m.,[19]

> Michael Carvin, the lawyer for the plaintiffs [in a similar case], has appealed directly to the Supreme Court
>
> "I don't know that four justices, who are needed to [take the case] here, are going to give much of a damn about

[19] http://talkingpointsmemo.com/dc/michael-carvin-halbig-supreme-court.

> what a bunch of Obama appointees on the D.C. Circuit think," Carvin told TPM on Thursday .
>
> . . . .
>
> "There's plenty of cases where [Supreme Court justices] take important issues even if there's no circuit split — like the gay marriage cases, they might take those," Carvin said. "If you've gone through that process and you don't really care what [the Obama-appointed judges] think — because I'm not going to lose any Republican-appointed judges votes on the *en banc* — then I think the calculus would be, well let's take it now and get it resolved."
>
> And if the case reaches the Supreme Court, Carvin expects all five Republican-appointed justices to rule that the federal exchange subsidies are invalid.
>
> Asked if he believes he'd lose the votes of any of the five conservative justices, he smiled and said, "Oh, I don't think so."

Id. The extensive quote is worthwhile because may show in detail the dangers of partisanship, and of hoping that one particular party's appointed judges will deliver a certain result in a mechanistic, pre-determined, "results-driven" fashion. Again, Amicus has admired some of Carvin's work against the Mandate, but nonpartisanship on a court is a good idea.

Amicus, for his part, has tried to appear in this Court in a relatively nonpartisan fashion, at least *vis-à-vis* political parties or "conservative"/"liberal" disputes. For example, he has upheld affirmative action, but also defended each State's people's right to end affirmative action. In like fashion, he has written to the Court in various "pro-life" settings, regardless of political ideology. In *Burwell v. Hobby Lobby Stores, Inc.* (134 S. Ct. 2751 (2014)), he wrote an amicus brief suggesting, *see id.*, that employers be given a respite from the part of the Act which made them participate in killing little, unborn children (or at least, killing them from those employers' moral/medical perspective re abortifacient contraceptives). In 2012, Amicus supported upholding the Act, *see, e.g.*, Mots. *supra* n.3, so that more Americans might avoid illness and death. Re mandatory nationwide legalized same-sex marriage, he has suggested that the sodomy-norming quality of that mandate might lead more people, including the impressionable young, to try sodomy and thus risk dying of AIDS. Amicus may be "repetitive", but at least he is consistent in emphasizing the value of human life, whether he has to join mostly-Democratic legal parties and amici (supporting the Act) or mostly-Republican legal parties and amici (supporting an exemption from the Act's "abortifacient mandate"). If nonpartisanism saves lives, so be it.

IX. A "MIDDLE GROUND" IN THIS DISPUTE: ALLOWING PEOPLE IN THE STATES WITH FEDERAL EXCHANGES TO INDIVIDUALLY OPT OUT OF THE SUBSIDIES, WITHOUT

CANCELING SUBSIDIES FOR THOSE WHO WANT THEM

While Amicus agrees with Respondents Burwell et al. that the federal subsidies are valid, some may disagree. If the Court agrees with those latter people: is there some "middle ground" available, between the extremes of either destroying the subsidies, or forcing the subsidies even on those who do not want them?

One such middle ground may be the simple expedient of allowing those who live in the 34 States with federal Exchanges, to sign a simple waiver form that would exempt them from receiving subsidies. This would have the effect, in many cases, of also exempting them from the Mandate. (The Mandate would still be in effect, but would not affect those who would have to follow it only because they would receive subsidies that artificially raise their income level to the point that those people would be forced to follow the Mandate.)

This would neatly solve the conundrum brought forth by Petitioners, who complained that the subsidies forced them to follow the Mandate. However, at least in their case, no subsidies, no Mandate. But everyone else who *wants* the subsidies, would still get them. "Problem solved."

This solution has not only the appeal of simplicity, but also moral appeal as well. Forced consumption, in this case, forced consumption of unwanted subsidies, is a grotesque idea. Gifts are usually to people who want them, not hate them.

Imagine the hypothetical of someone who attends his Aunt Edna's holiday party annually, and without fail, she gives him—every year—a gigantic jar of lutefisk that he does not want at all, but cannot really refuse for fear of the consequences. But imagine further, that with this jar, there comes the added, and totally unwanted, obligation that he must take the jar to the local church supper, and consume the lutefisk there with the other guests. This resembles the real-life unpleasantness of the forced subsidies, which in turn force obedience to the Mandate to purchase ("consume") unwanted health insurance. Again, forced consumption is ugly. *See, e.g., Rochin v. California*, 342 U.S. 165 (1952) (condemning forced consumption).

Hobby Lobby, *supra* at 30, allows people to waive out of providing unwanted abortifacient contraceptives, *see id.* Somewhat similarly, though religious issues are not really apposite in the instant case, persons who hate the unwanted money "gift" of subsidies could be allowed to refuse that gift, if they live in the 34 federal-Exchange States.

The option of waiver offers the beauty of free individual choice. Those who want and need, maybe desperately need, the subsidies, may choose to accept them. Those who despise the subsidies, may refuse them. This free choice avoids the two extremes of:

1) those who dislike the subsidies will, by forcing the destruction of the subsidies, drag down with them those who want the subsidies, by causing the latter to lose the subsidies, and maybe lose their health and lives in the process; or

2) those who like the subsidies will, by maintaining the existence of the subsidies, drag down with them those who don't want the subsidies, by causing the latter to feel oppressed and to be forced for decades to buy unwanted health insurance under the Mandate.

There is also the issue of the employer mandate. Amicus has never opposed that mandate, since businesses are much more regulable than individuals in many cases. However, if the Court sees it as necessary to give employers in the 34 States an opt-out of the kind that Amicus describes above for individuals opting out of subsidies, so be it. (*But see* Br. for Resp'ts, Jan. 21, 2014, at 54 (noting that an out-of-state employee may also trigger employer's responsibility).)

The tie between the subsidies and the employer mandate is that if even one employee gets a subsidy, the employer is subject to liability, *see* 26 U.S.C. § 4980H (Act § 1513(a)). It is possible that if there is an opt-out for individuals, then some employees at a business may opt out of the subsidies, but others may accept the subsidies. And one employee will be enough to trigger employer liability. Again, it is up to the Court whether, considering this and other factors, employers should be allowed the same opt-out from liability, that individuals would be allowed re the subsidies (and any triggering of the Mandate from those subsidies).

Amicus is not suggesting this idea in order to surreptitiously do away with the Mandate (for many residents of 34 States), either. He is against the Mandate, but the Mandate is good law right now, so

it has to be followed. If allowing a waiver of the subsidies allows some people to avoid the Mandate, that is nice, of course, though Amicus would prefer a straight overruling of the Mandate on the merits, rather than a *de facto*, partial overturning of the Mandate in 34 States, stemming from waiver of, or ending of all of, the subsidies.

On that note, Amicus stresses that the waiver is not his preferred position; it is only if there is no other choice. That is, if the choice is between: a) giving Respondents a total loss, and, b) giving the 34 States' residents a voluntary waiver of subsidies: then the latter would be better, of course.

(One concern of Amicus is that if waivers are allowed, that people might actually be coerced, whether by family, employer, or otherwise, to waive and refuse a subsidy that they really want. So, again, Amicus supports Respondents' position, which would avoid the difficulty just mentioned.)

Both sides in this case may not like the opt-out solution perfectly. Petitioners may say that it is not enough for individuals to opt out; the 34 States may still suffer (somehow) from their citizens getting subsidies the State does not want them to get, and the States' employers may still be on the hook for liabilities related to the subsidies. Respondents may say that the Mandate will be disrupted (since those opting out of subsidies may *de facto* thus opt out of the Mandate), and the whole Act will be disrupted, and that it smells of "nullification" for a State's refusal to set up an Exchange, to offer that State's residents an exemption from a federal requirement (subsidy and/or Mandate).

But we live in an imperfect world. If this Court cannot give Respondents everything they want, then the Court may be at least able to avoid destroying the subsidies, by offering an "escape hatch" for those who do not want the subsidies. When one can just throw out the bathwater, it is often wise not to throw out the baby with it.

X. EVEN IF THE SUBSIDIES ARE ENDED, THAT ISSUE IS SEVERABLE FROM THE REST OF THE ACT

Just in case the Court overturns the subsidies, though, they should be held severable from the rest of the Act. The amicus brief of Citizens' Council for Health Freedom et al. (Dec. 29, 2014) openly desires the destruction of the whole Act through non-severability, *see id.* at 34-37. Other amici or Petitioners may silently wish the destruction of the Act by the destruction of the federal-Exchange subsidies. But just as in *NFIB*, *see id.* at 2607-08, the overruling of certain aspects of the Act was held severable from the Act as a whole, so too should the subsidies be held severable.

Some may say that the subsidies, like the Mandate, are supposedly an "indispensable leg" of the Act, so that "no subsidies, no Act" However, that theory is questionable. It was certainly held questionable for the Mandate, *see* once more *Florida v. HHS*: "In light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate, the plaintiffs have not met the heavy burden needed to rebut the presumption of severability", 648 F.3d at

1323; "It is also telling that none of the insurance reforms, including even guaranteed issue and coverage of preexisting conditions, contain any cross-reference to the individual mandate or make their implementation dependent on the mandate's continued existence", *id.* at 1324; "Congress included other provisions in the Act, apart from and independent of the individual mandate, that also serve to reduce the number of the uninsured by encouraging or facilitating persons (including the healthy) to purchase insurance coverage", *id.* at 1325 (Dubina and Hull, JJ.).

If the supposedly "absolutely necessary" Mandate is severable, as per Judges Dubina and Hull, *supra*, then the supposedly "absolutely necessary" subsidies may be severable as well.

This is all the more true in that neither "leg" of the Act would be completely destroyed by ending the federal-Exchange subsidies. After all, the "leg" of the State-exchange subsidies would still exist. Also, the "leg" of the Mandate would exist, even if fewer people would be obliged to fulfill it without the subsidies. (And the federal fisc would be stronger for not having to pay out the subsidies; thus, that money could be redirected into healthcare in some other way that might help, even though the subsidies would be better-focused, and better, period.)

Some more general case law on severability: from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U. S. 477 (2010):

> "Generally speaking, when confronting a constitutional flaw in a

> statute, we try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–329 (2006).
>
> The Sarbanes-Oxley Act remains fully operative as a law[; T]he remaining provisions are not "incapable of functioning independently," *Alaska Airlines*, 480 U. S., at 684, and nothing in the statute's text or historical context makes it "evident" that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will. *Ibid.*; see also *Ayotte*, *supra*, at 330.

Free Enter. Fund, *supra*, at 3161-62 (Roberts, C.J.) (citations and some quotation-marks omitted).

Or, as put more pithily in *NFIB* itself: "The question here is whether Congress would have wanted the rest of the Act to stand . Unless it is 'evident' that the answer is no, we must leave the rest of the Act intact." *Id.* at 2607 (Roberts, C.J.) (citation omitted).

* * *

There is an old saying, "Lead, follow, or get out of the way." The States had an opportunity to serve their people by getting them healthcare subsidies under the Act, and about a third of the States did so. However, some two-thirds did not. This is their

right, under our federalist traditions and Constitution.

However, those latter States may now be claiming authority to nullify *Federal* efforts to help those States' people, i.e., authority to nullify the subsidies. Seeing the continuing problems with healthcare in this country, e.g., every woman maybe one missed medical appointment away from a hideous death due to ovarian cancer, it may not be meet for a State to stand in the way of help from a higher level of government. That State is arguably doing something similar to a bystander standing in the way of a rushing ambulance on a street, thus blocking vital help from reaching the ill. If a State cannot help one of its residents, will not help, refuses to help: maybe it should at least get out of the way, while someone else helps. In the biblical story of the Good Samaritan (*Luke* 10:29-37), those who left the traveler for dead, at least *did not stand in the way of* the Samaritan's help, *see id.*

Cf. "[T]he Constitution . . . is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (Goldberg, J.). The life and health of our Union depends on the lives and health of the honorable residents of the Union, all 320-some million. Amicus believes it is constitutional for the Court to save the subsidies, at least for those who want them. If the Court concurs, this will likely save lives, enhance the Court's reputation, and "bind up the nation's wounds",[20] in order to more firmly and

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[20] President Abraham Lincoln, 2d Inaugural Address (Mar. 4, 1865).

nobly bind together the Union that this honorable Court serves.

CONCLUSION

Amicus respectfully asks the Court to uphold the judgment of the court of appeals, insofar as is reasonably possible; and humbly thanks the Court for its time and consideration.

January 28, 2015 Respectfully submitted,

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